No. 03-956

Supreme Court, U.S.
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In The
Supreme Court of the United States

BOY SCOUTS OF AMERICA, *et al.*,

Petitioners,

v.

NANCY WYMAN, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND THE STATES OF ALABAMA, IDAHO, SOUTH DAKOTA AND UTAH AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether a State's removal of the Boy Scouts from a forum because of that organization's viewpoints and/or membership policies violates the Boy Scouts' First Amendment rights?

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INTEREST OF AMICI

The Commonwealth of Virginia and the States of Alabama, Idaho, South Dakota and Utah (collectively the "States") are sovereign States of the Union. As such, the States have two distinct interests in this litigation.

First, the States have an interest in ensuring that the important though divisive issues of our time are resolved through a fair competition of ideas on a level playing field. Neither side of any issue should use the power of government to tilt the playing field toward a particular point of view by unconstitutionally discriminating against the opposing view. The history of our Nation illustrates that even an overwhelming political consensus can be reversed in a short time.[1] The viewpoint that commands a political majority today may well be the minority view tomorrow. We do not know what consensus will emerge from this competition of ideas or whether the consensus that does emerge might be reversed in our lifetimes, but we do know that the competition must by governed by the guarantees of the First Amendment. The most fundamental principles of our society demand it. Although one viewpoint may hold sway in a particular jurisdiction, the power of government must not be used to tilt the playing field against those who think differently in order to gain an advantage in the competition of ideas.

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[1] For example, in the second decade of the twentieth century, there was an overwhelming societal consensus that the manufacture, sale, and transportation of intoxicating liquor should be banned. *See* U.S. Const. amend XVIII (ratified January 29, 1919). However, less than fifteen years later, there was an overwhelming societal consensus that this ban should be lifted and the matter left to the individual States. *See* U.S. Const. amend. XXI (ratified December 5, 1933).

This competition of ideas is exemplified by the current debate over homosexuality. It is a sensitive issue, as well as a divisive one. While the debate surely encompasses many shades of opinion, it can perhaps be summarized by two opposing viewpoints. On the one hand, there are those who hold a more traditional view, who regard homosexuality as morally and socially inappropriate. The Boy Scouts are among those holding such a viewpoint and their views guide their selection of the adults who serve as role models in their organization. On the other hand, there are those who hold a non-traditional view, who regard homosexuality as no less legitimate than heterosexuality, and who regard such role model concerns as both unnecessary and offensive. Neither viewpoint is enshrined in the Constitution and neither is beyond its protection. Even so, given the divisiveness over the issue, it is not surprising that the adherents of one view will sometimes attempt to use the power of government to suppress the other view. In some cases, adherents of the traditional view have sought to use government in this manner. In other cases, those who hold the non-traditional view have embarked on such a course. In this case, Connecticut has decided that the Boy Scouts of America must be excluded from a forum simply because the organization embraces and teaches the traditional view. Though Connecticut has not eliminated the Boy Scouts from the competition of ideas, it has tilted the playing field against them.

Connecticut's actions demand that this Court assume the role of umpire and ensure that the competition of ideas takes place on a level playing field. This Court has been called to this role before. When a statewide majority favoring the traditional view of homosexuality attempted to overturn decisions of local governments that favored the

non-traditional view, this Court declared the attempt unconstitutional. *See Romer v. Evans*, 517 U.S. 620 (1996) (invalidating state constitutional amendment prohibiting local governments with otherwise broad legislative power from enacting legislation prohibiting discrimination based on sexual orientation). Similarly, when college and university administrations that favored the traditional view refused to recognize or fund student organizations that favored the non-traditional view, the lower courts, following this Court's decisions, invalidated their actions. *See, e.g., Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997); *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 561 (8th Cir. 1988); *Gay Lib v. University of Mo.*, 558 F.2d 848 (8th Cir. 1977).

On the other hand, when advocates of the non-traditional view wished to use the private parade of another to advertise their message, this Court vindicated the parade group's right to espouse their own message without dilution. *See Hurley v. Irish-American Gay, Lesbian, and Bisexual Group*, 515 U.S. 557 (1995). Similarly and most importantly for the present case, when New Jersey attempted to require the Boy Scouts to abandon its traditional view and adopt policies reflecting the non-traditional view, this Court recognized the right of the Boy Scouts to follow the traditional view without governmental interference and to select their adult leaders in keeping with their view. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). Once again, it is time for this Court to protect the level playing field.

Second, the States have an interest in the success of organizations, such as the Boy Scouts, which "instill values in young people" and "prepare them to make ethical choices over their lifetime in achieving their full potential." *Dale*,

530 U.S. at 649 (quoting the Boy Scouts' mission statement). Regardless of how one feels about the Boy Scouts' view of homosexuality, our community benefits from an organization that teaches youth to commit themselves to the ideals of Scouting, as exemplified in the Boy Scouts' Oath and Law.[2] Indeed, the value of the Boy Scouts is demonstrated by the fact that some of our most distinguished citizens and leaders have been shaped by the Boy Scouts. The list of men involved with the Boy Scouts includes three U.S. Presidents, the first man to walk on the moon, the physician who performed the first artificial heart transplant, the all time home run leader, the founder of Microsoft, one of the most successful motion picture

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[2] Recited by millions of American boys over the years, the Boy Scouts' Oath provides:

> On my honor I will do my best
> To do my duty to God and my country
> and to obey the Scout Law;
> To help other people at all times;
> To keep myself physically strong,
> mentally awake, and morally straight.

Dale, 530 U.S. at 649. The Boy Scouts Law, in turn, embodies qualities to which all should aspire, stating: "A Scout is:

- Trustworthy,
- Loyal,
- Helpful,
- Friendly,
- Courteous,
- Kind,
- Obedient,
- Cheerful,
- Thrifty,
- Brave,
- Clean, and
- Reverent."

Id.

directors of all time, as well as numerous Governors, Cabinet Secretaries, and members of Congress. *See Ultimate Boy Scouts of America History Site*, www.members.aol.com/randywoo/bsahis/famous.htm (last viewed on January 6, 2004).

Nevertheless, there are those who believe that the Boy Scouts' embrace of the traditional view of homosexuality outweighs the undisputed positive influence of the organization. In some jurisdictions where such persons constitute the current political majority, the Boy Scouts are being excluded because of their viewpoint. *See, e.g., Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (rejecting a local school board's attempt to exclude Boy Scouts from school facilities); *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (Cal. App. 2002) (upholding the power of the City to exclude Boy Scouts from program allowing non-profit groups to use City's marina rent free), *appeal docketed*, No. S11261 (Cal. March 26, 2003). *See also Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (private party lawsuit holding that City violated the federal Establishment Clause by leasing a camp ground to the Boy Scouts).

If government can exclude the Boy Scouts simply because a current political majority disagrees with their view on a single issue, then the future success of the organization will be inhibited. It does not matter that Boy Scouts may suffer viewpoint discrimination only in Connecticut or only in a few jurisdictions. Any exclusion will undermine both the organization and principles of the First Amendment. Government should not be allowed to constrain the Boy Scouts by excluding it from programs generally open to other not-for-profit groups. At some point, this Court surely will have to intervene to ensure that

the First Amendment is upheld and that the numerous positive contributions of the Boy Scouts are not compromised simply because some governments disapprove of their traditional viewpoint. Rather than waiting for some future case, this Court should grant review in this one.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS NECESSARY TO RESOLVE A CONFLICT IN THE CIRCUITS ON THE ISSUE OF WHETHER GOVERNMENT MAY EXCLUDE A PRIVATE ORGANIZATION SIMPLY BECAUSE OF THE ORGANIZATION'S VIEWPOINT.

Review of the decision below is necessary to resolve a split in the Circuits on the issue of whether government can exclude a private organization from participation in a forum simply because the government disagrees with the membership policies or viewpoints of the private organization.

The Second Circuit held that a private organization could be excluded simply because of its viewpoint. To reach that result, the Second Circuit recognized a distinction between direct and indirect regulation of First Amendment rights, a distinction never recognized by this Court, and found it controlling. The Second Circuit reasoned that a law that compels a group to adopt a particular viewpoint is a *direct* regulation of First Amendment rights. In contrast, a law which allows a group to believe whatever it wishes, but denies the group access to a generally available government program – based on its views – is only *indirect* regulation of the freedom of association and expression. According to the Second Circuit, direct regulation is never permitted, but indirect regulation is perfectly

acceptable. In other words, the government cannot tell the Boy Scouts to abandon the traditional view of homosexuality, but it can penalize the Boy Scouts for refusing to abandon policies by which they avoid sending a message they perceive as conflicting with their own.

In sharp contrast, the Eighth Circuit held that a private organization cannot be excluded from an otherwise generally available program simply because of its viewpoint on a particular issue.[3] *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001), involved a state program in Missouri whereby various private organizations "adopt" a stretch of highway by assuming responsibility for litter clean up. In return, the name of the organization is posted on signs along the stretch of the highway that is "adopted." The Ku Klux Klan asked to participate. Missouri refused to allow them to participate because the Klan has a racist viewpoint and because it was concerned that including the Klan would constitute racial discrimination by Missouri. *Cuffley*, 208 F.3d at 705.

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[3] Every other Circuit to address a similar issue has reached a similar result. *See, e.g. Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1221-25 (9th Cir. 2003) ("unpatriotic" messages must be allowed on highway overpass fence); *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997) (student organizations that advocate the non-traditional view of homosexuality must be funded); *Knights of the Ku Klux Klan v. East Baton Rouge Parish Sch. Dist.*, 578 F.2d 1122 (5th Cir. 1978) (issuing preliminary injunction prohibiting local school district from enforcing policy which excluded groups on the basis of viewpoint and remanding for further factual development). *See also Sons of Confederate Veterans v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) (having allowed a private organization to participate in the State's special license plate program, State could not bar a particular design for the special plate). Thus, the decision below is significantly outside the mainstream of jurisprudence.

The Eighth Circuit held that the Klan must be allowed to participate despite its reprehensible views. In doing so, the Eighth Circuit recognized that a "State simply cannot condition participation in its highway adoption program on the manner in which a group exercises its constitutionally protected freedom of association." *Id.* at 709. Moreover, the Eighth Circuit recognized that merely "offering a service to a group that discriminates is not equivalent to discrimination in the offering of that service." *Id.* at 711.

If the First Amendment protects a group as extreme as the Ku Klux Klan, then surely it must protect an organization as mainstream as the Boy Scouts of America. The lower court's decision cannot be reconciled with *Cuffley*. Certiorari should be granted to resolve the conflict.

II. REVIEW SHOULD BE GRANTED TO CLARIFY WHETHER THE CONSTITUTION ALLOWS "INDIRECT" REGULATION OF FIRST AMENDMENT RIGHTS

Even if there were no split in the Circuits, the unique First Amendment analysis relied upon by the Second Circuit would justify review by this Court. As noted above, the lower court's decision turned on a distinction, unrecognized in this Court's jurisprudence, between direct and indirect regulation of First Amendment rights. Under the Second Circuit's rule, the government is permitted to indirectly regulate the speech of a private organization by denying the group access to a generally available government program because they hold disfavored beliefs. Under its view, government may not wield the weapon of direct coercion against an organization's viewpoint, but may nevertheless aim a different weapon at the same target by

denying equal access to any private group that does not conform its views to the political orthodoxy of the day.

The implications of such a distinction are breathtaking. Taken to its logical end, it means that the government can deny such things as tax exemptions, access to public facilities, and public funding to organizations that disagree with the current political majority. For example, the Roman Catholic Church might be told to ordain women priests or lose its tax exemption for church property. A political party might be told it must stop criticizing a Governor's proposal to raise taxes or lose the right to hold its conventions in a publicly owned arena. A student group at a public university might be told to abandon its criticism of the institution's admissions policies or lose the right to apply for student activities funds. In these examples, the government is not directly regulating viewpoints by directing that women must be ordained, that the Governor's tax proposal must be supported, or that institutional policies cannot be criticized. Rather, government is regulating indirectly by making access to a generally available government benefit dependent on the viewpoint of the beneficiary.

Moreover, the Second Circuit's endorsement of "indirect" regulation of First Amendment rights is in fundamental conflict with this Court's jurisprudence. For example, in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 895 (1995), this Court was confronted with a situation where a public university wished to deny funding to a particular student publication simply because of the student publication's editorial point of view. The public university was not directly regulating the student publication – it was not telling the publication what its editorial viewpoint should be or forcing it to

accept staff members who had a different view. Rather, the public university was *indirectly* regulating the publication by saying that as long as it maintained a certain viewpoint, it would not have access to generally available support from the University. Although this was only indirect regulation and, thus, would be acceptable under the Second Circuit's reasoning, this Court ruled that, having chosen to support student publications, the public university must support all of them regardless of the viewpoint espoused. *Id.* at 831-32.

Similarly, in *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), this Court was confronted with a situation where a school district wished to prohibit a private organization from showing a particular film in a school auditorium. The school district was not attempting to regulate the organization's speech directly – it was not telling them what to believe or even what films to show. Rather, it was regulating indirectly by making its ability to use the school auditorium to show films dependent on not showing films that reflected a particular viewpoint. Again, although this was clearly indirect regulation as the Second Circuit describes it, this Court ruled that the school district, having allowed the showing of films, must allow the organization to show the film of its choice. *Id.* at 393-94. *See also Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (public school cannot exclude religious group from using school facilities for meetings simply because the group advocated a religious perspective); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("To deny exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.").

If "a person may not be compelled to choose between the exercise of a First Amendment right and participation

in a viable public program," *Thomas v. Review Board*, 450 U.S. 707, 716 (1981), then surely Connecticut cannot regulate indirectly by forcing the Boy Scouts to choose between maintaining their current viewpoint, together with the policies by which they convey their message, and participating in Connecticut's state employee charitable campaign.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be **Granted**.

Respectfully Submitted,

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